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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 598

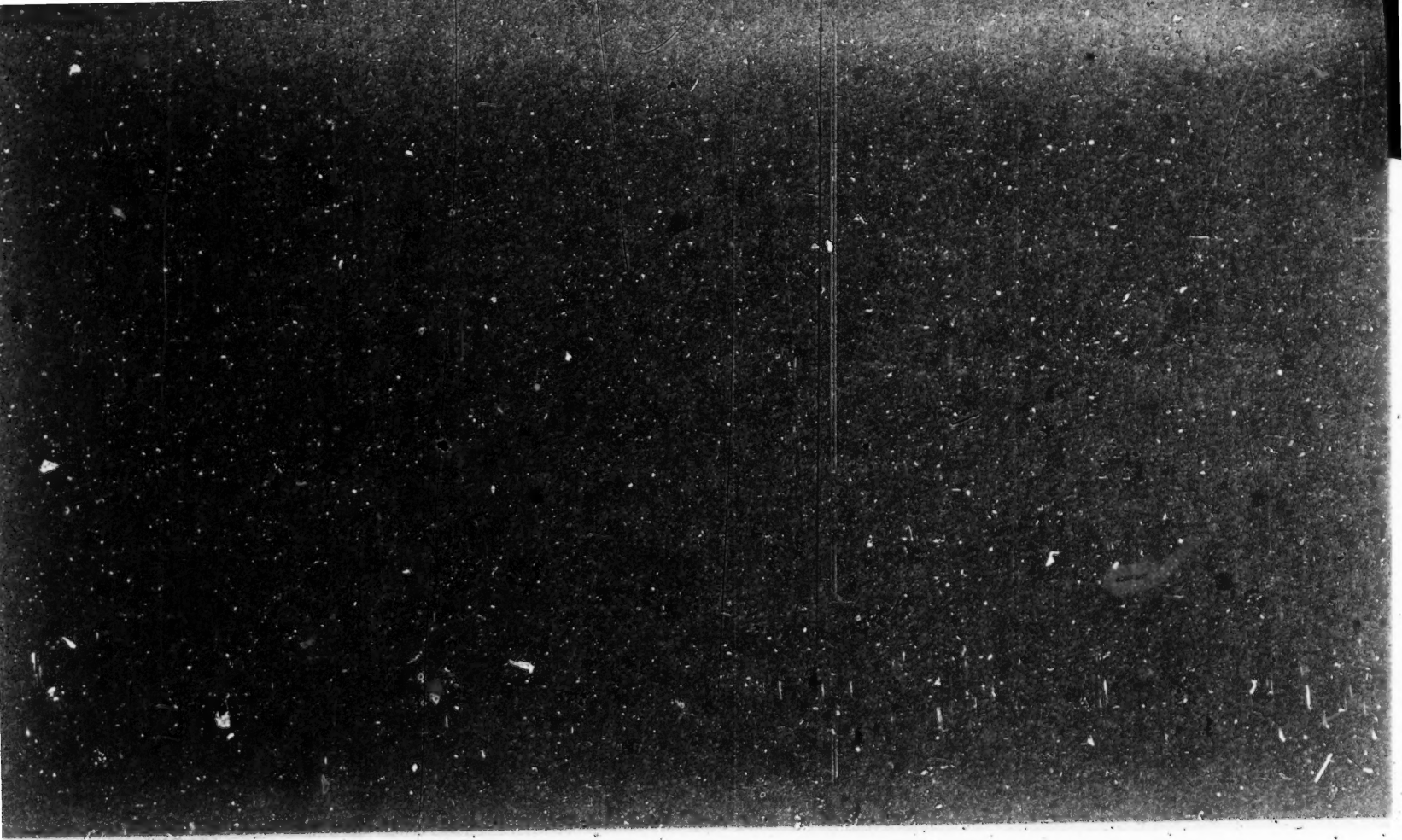
ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INCORPORATED

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

FILED JANUARY 16, 1939



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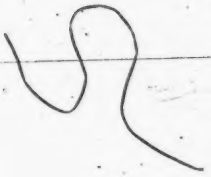

[fol. 1] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

No. 1733

ATLAS LIFE INSURANCE COMPANY, a Corporation, Appellant,

v.

W. I. SOUTHERN, INCORPORATED, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of Oklahoma

CERTIFICATE—Filed January 4, 1939

In the above entitled cause certain questions of law have arisen on the record upon which this court desires the instructions of the Supreme Court of the United States for the proper decision of such cause. Accordingly a certificate of such questions has been prepared and duly signed by the judges of the court sitting in said cause as follows:

"CERTIFICATE OF QUESTIONS OF LAW

"STATEMENT

"On March 13, 1936, Atlas Life Insurance Company, a corporation organized under the laws of Oklahoma, issued three policies of insurance on the life of Wheaton I. Southern, one for $25,000.00, one for $15,000.00, and one for $10,000.00. The beneficiary in each policy is W. I. Southern, Inc., a corporation organized under the laws of Delaware. The several policies were issued upon a single application, dated March 9, 1936. The insured died February 23, 1938. [fol. 2] Each policy contained the following incontestable clause:

'This policy will be incontestable after two years from date of issue except for the nonpayment of premium and except as to provisions and conditions relating to disability benefits and those granting additional insurance specfically aganist death by accident, if any.'

and the following provision:

'All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it be contained in the written application and a copy of the application is endorsed upon or attached to this policy when issued.'

On March 7, 1938, W. I. Southern, Inc., commenced an action against the Insurance Company on said policies in the district court of Tulsa County, Oklahoma, and on the same day summons was issued therein and served on the Insurance Company. On March 8, 1938, the Insurance Company filed its bill in equity against W. I. Southern, Inc., in the United States District Court for the Northern District of Oklahoma for cancellation of said policies on the ground that Wheaton I. Southern, in the application therefor, falsely, intentionally, and fraudulently made certain false answers to questions material to the risk. W. I. Southern, Inc., interposed a motion to dismiss the bill in equity on the ground that the Insurance Company had an adequate remedy at law by setting up the alleged fraud as a defense to the action on the policies pending in the state court. The trial court sustained a motion to dismiss the bill. The Insurance Company elected not to plead further. A decree was entered dismissing the bill, from which the Insurance Company has appealed.

Under the Oklahoma practice the Insurance Company can set up the fraud as a defense to the action at law on the policies, or can interpose a cross-complaint in that action for cancellation of the policies. Farmers & Merchants National Bank v. Hoyt, 29 Okl. 772, 120 P. 264.

[fol. 3] "The action on the policies brought in the state court was not removable by the Insurance Company since it was a citizen and resident of the state of Oklahoma.

"Question Certified

"1. Is the remedy at law available in the state court by setting up the alleged fraud as a defense to the action on the policies, such an adequate remedy at law as will constitute a valid defense to the suit in equity for cancellation of the policies?

"2. In order to constitute a defense to a suit in equity to cancel a policy of life insurance on the ground of fraud, is

it essential that the remedy at law be available to the complainant in an action at law pending in the federal court?

"3. Is the principle that the adequate remedy at law which will preclude a federal court of equity from granting relief must be one available in the federal courts, applicable in the instant case where the relief sought is affirmative in form but defensive in character?

Orie L. Phillips, Sam G. Bratton, Robert L. Williams, Judges of the United States Circuit Court of Appeals sitting in said case.

ORDER

It is now here ordered by this court that such certificate be filed and entered of record in this court and a true copy of this order and the original of such certificate be duly certified by the clerk of this court and by him duly transmitted [fol. 4] to the Supreme Court of the United States for its action thereon.

January 4, 1939.

Approved: Orie L. Phillips, Circuit Judge.

Clerk's certificate to foregoing paper omitted in printing.

Endorsed on cover: File No. 43,083. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 598. Atlas Life Insurance Company, vs. W. I. Southern, Incorporated. Certificate. Filed January 16, 1939. Term No. 598, O. T., 1938.

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No. 598

In the Supreme Court of the United States

October Term, 1938.

ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INC.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

Brief and Argument for Atlas Life Insurance Company.

LOGAN STEPHENSON,
Tulsa, Oklahoma,
ELMER J. LUNDY,
Tulsa, Oklahoma,
Attorneys for Atlas Life Insurance Company.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 598

ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INC.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF AND ARGUMENT FOR ATLAS LIFE INSURANCE COMPANY.

Statement and Summary.

The matters herein involved arise by reason of the certification of three questions of law by the judges of the United States Circuit Court of Appeals for the Tenth Circuit. The certificate was filed in this court January 16, 1939.

The cause pending in the United States Circuit Court of Appeals for the Tenth Circuit (No. 1733), is an appeal by Atlas Life Insurance Company, a corporation, as appellant, *vs.* W. I. Southern, Inc., a corporation, appellee, from a decision of the United States District Court for the Northern District of Oklahoma, which sustained a motion to dismiss a suit in equity filed by Atlas Life Insurance Company in that court against W. I. Southern, Inc., beneficiary, for the cancellation of policies issued on the life of Wheaton I.

Southern. The policies in question were issued on March 13, 1936, one policy being for $25,000.00, one for $15,000.00, and one for $10,000.00. (Cert., p. 1) Each policy contained the following clause relating to incontestability:

> "This policy will be incontestable after two years from date of issue except for the nonpayment of premium and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any." (Cert., p. 1)

The insured died February 23, 1938 (Cert., p. 1), eighteen days before the expiration of the two-year contestability period.

The action in the United States District Court for cancellation of the policies was filed by the Insurance Company on March 8, 1938 (Cert., p. 1), five days before the expiration of the contestability period, the grounds of cancellation as set forth in the petition being because of false, intentional and fraudulent answers to questions in the application, material to the risk. (Cert., p. 2)

On March 7, 1938 (Cert., p. 2), twelve days after the death of the insured, W. I. Southern, Inc., the corporate beneficiary, commenced an action against Atlas Life Insurance Company in the District Court of Tulsa County, Oklahoma, and caused a summons to be issued and the same to be served on the Insurance Company on March 7, 1938. (Cert., p. 2)

In the cause brought by the Atlas Life Insurance Company for cancellation of the policies on the grounds of fraud the beneficiary (W. I. Southern, Inc.) filed its motion to dismiss the bill on the ground that the Insurance Company had an adequate remedy at law, by setting up the alleged fraud as a defense to the action on the policies pending in the State Court. (Cert., p. 2) The trial court sustained a motion to

dismiss the bill, a decree was entered dismissing it, and from this decree of dismissal the Insurance Company appealed to the Tenth Circuit Court of Appeals. (Cert., p. 2)

The Atlas Life Insurance Company was and is a citizen and resident of the State of Oklahoma, and being defendant in the suit filed in the State Court of Oklahoma, had no ground for removal to the Federal Court, of the cause there pending. (Cert., p. 2)

The judges of the United States Circuit Court of Appeals for the Tenth Circuit in the certificate filed, have certified to this Court three questions, which are as follows:

> "*1.* Is the remedy at law available in the state court by setting up the alleged fraud as a defense to the action on the policies, such an adequate remedy at law as will constitute a valid defense to the suit in equity for cancellation of the policies?
>
> "*2.* In order to constitute a defense to a suit in equity to cancel a policy of life insurance on the ground of fraud, is it essential that the remedy at law be available to the complainant in an action at law pending in the federal court?
>
> "*3.* Is the principle that the adequate remedy at law which will preclude a federal court of equity from granting relief must be one available in the federal courts, applicable in the instant case where the relief sought is affirmative in form but defensive in character?" (Cert., pp. 2-3).

This brief and argument is filed on behalf of Atlas Life Insurance Company.

Statutes Involved.

There are no statutes necessary for the decision of these certified questions save and except section 267 of the Judicial Code, U. S. C. A., Title 28, section 384, which provides:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law,"

and certain statutes of the State of Oklahoma which we believe pertinent to the decision of the certified questions. These are the following sections of Oklahoma Statutes 1931:

164 relating to the commencing of a civil action;

165 relating to the petition;

166 relating to the issuance of summons;

168 relating to the service and return of summons;

217 relating to the time of filing pleadings;

231 relating to motions;

101 relating to the time of bringing civil actions;

and are set out, each under its appropriate number, in the appendix hereto.

The decision of the United States District Court for the Northern District of Oklahoma, in the instant case, is officially reported in 23 Fed. Supp. 334, under the style of *Atlas Life Insurance Company* v. *W. I. Southern, Inc.*

ARGUMENT *and* AUTHORITIES.

POINT I.

The First Question Certified to Should Be Answered in the Negative.

In a long line of unbroken decisions, this Court has held that the remedy at law which is a bar to equity jurisdiction, must be a remedy at law available to the plaintiff in a court of the United States. The following cases sustain the negative of the first question certified:

Arrowsmith v. *Gleason*, 129 U. S. 86;
Smyth v. *Ames*, 169 U. S. 466;
Chicago, B. & Q. Ry. Co. v. *Osborne*, 265 U. S. 14;
Risty v. *Chicago, etc., Ry. Co.*, 270 U. S. 378;
Henrietta Mills v. *Rutherford County*, 281 U. S. 121;
Di Giovanni v. *Camden F. Insurance Asso.*, 296 U. S. 64;
Petroleum Exploration, Inc., v. *Public Service Commission of Ky.*, 304 U. S. 209.

We believe that a citation of the above leading cases is all that is necessary in support of the contention of the Atlas Life Insurance Company that a remedy at law available only in a state court, even if plain, adequate and complete, is not such a remedy as is contemplated or meant by the section of the Judicial Code above set forth. It is therefore no bar to the maintenance of a suit in equity asking cancellation of policies where the requisite jurisdictional amount and the requisite diversity of citizenship exist. We emphasize our position by quotations from the language of some of the cases above cited.

In *Petroleum Exploration, Inc.*, v. *Public Service Commission of Kentucky, supra*, the doctrine is tersely stated:

"It is settled that no adequate remedy at law exists so as to deprive federal courts of equity jurisdiction unless it is available in the federal courts." (l. c., p. 217)

In *Di Giovanni* v. *Camden Fire Insurance Company*, *supra*, the rule is there stated:

"It is true, as this court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law." (l. c., p. 69)

and further:

"If a plaintiff is entitled to be heard in the federal courts, he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford." (l. c., p. 69)

In *Risty* v. *Chicago, etc., Ry. Co.*, *supra*, the principle is thus stated:

"The test of equity jurisdiction in a federal court is the inadequacy of a remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts." (l. c., p. 388)

In *Smyth* v. *Ames*, *supra*, the opinion states:

"One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." (l. c., p. 479)

It must be most apparent that if a litigant cannot be deprived of his right to invoke the equitable jurisdiction of the federal court because he may *sue at law* in a state court, he cannot be deprived of that right because he *may file an answer* in a law case pending in a state court.

We know of no decision in the federal courts which has sustained the affirmative of the first question being here discussed except the case of *New York Life Insurance Co.* v. *Marshall*, (C. C. A. 5th Cir.) 23 F. (2d) 225 (apparently), and the instant case in the Northern District of Oklahoma, above cited.

In the case of *New York Life Insurance Co.* v. *Marshall*, *supra*, there was a dissenting opinion in which the dissent relied upon the case of *Smyth* v. *Ames*, *supra*. The majority opinion in that case cites only *Phoenix Life Insurance Co.* v. *Bailey*, 80 U. S. (13 Wall. 616), and the case of *New York Life Insurance Co.* v. *McCarthy*, (C. C. A., 5th Cir.) 22 F. (2d) 241. An examination of both of the cases cited in this majority opinion discloses that the actions at law in those cases were pending in the federal courts and not in the state courts.

In the case of *New York Life Insurance Co.* v. *McCarthy*, *supra*, the equity case and the law case were both in the federal court and both were tried and appealed. The decree of dismissal of the equity suit was modified and affirmed while the judgment against the insurance company on the policy was reversed and remanded. Moreover, in the case of *New York Life Insurance Co.* v. *Marshall*, *supra*, while the majority opinion apparently based its *opinion* on the ground that the equity suit for cancellation could not be maintained where the fraud which was the ground of cancellation could be set up in defense of a pending action at law on the policy in the state court, the *decision* really turned on the question of jurisdiction. This is shown clearly by the language of the majority opinion from which we quote:

> "The only basis for equitable relief disclosed by the averments of the bill is as to a matter in controversy *which does not exceed*, exclusive of interest and costs, the sum or value of $3,000.00."

The Court's ruling is thus stated:

> "We conclude that the bill was properly dismissed because the only matter in controversy with reference to which relief sought was grantable, involved a sum or value *less than that required* to give the court jurisdiction." (Italics ours.)

The holding in this case being discussed is identical with the holding in *Di Giovanni* v. *Camden Fire Ins. Assn., supra,* where the suit was ordered to be dismissed for want of jurisdiction, because the requisite jurisdictional amount was wanting.

Point II.

The Second Question Should Be Answered in the Affirmative.

The second question certified is the opposite of the first.

We assume that no controlling emphasis should be placed on the word "pending" used therein, but assume that the question presented is intended to be the opposite of the first question. The question was thus formed, no doubt, because of the "pendency" of the law case in the State Court. The cases cited under the first point in our brief in support of the negative of the first question sustain the affirmative of this question.

Further it is the contention of the Atlas Life Insurance Company that even where an action by the insured is pending *in the Federal Court,* to which the Insurance Company may file an answer setting up the fraud claimed as a defense that this does not of necessity deprive the Federal Court of equity jurisdiction to entertain a suit for cancellation of the policies on the ground of fraud.

—*American Life Insurance Co.* v. *Stewart,* 300 U. S. 203;

Ruhlin v. *New York Life Insurance Co.*, (C. C. A. 3rd Cir.) 93 F. (2d) 416;

Stewart v. *American Life Insurance Co.*, (C. C. A. 10th Cir.) 89 F. (2d) 743.

In the case of *American Life Insurance Co.* v. *Stewart*, *supra*, in an opinion by the late Justice CARDOZO, the previous cases are reviewed, and it is there held that although an action at law is pending in the same federal court, to which action the insurance company may file and prove as a defense the fraud in procurement, that equity is not deprived of its jurisdiction. In the opinion attention is called to the principle of law that a "contest" means a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter, and then states the principle:

> "Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation. This exception to the general rule has been allowed by the federal courts with impressive uniformity. It has had acceptance in the state courts. It was recognized only recently in an opinion of this court, though the facts were not such as to call for its allowance. *Enelow* v. *New York L. Ins. Co.*, 293 U. S. 379, 384." (l. c. 212-213)

The court included in its opinion in that case a quotation from the case of *Davis* v. *Wakelee*, 156 U. S. 680, 688, as follows:

> "Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." (l. c. 214),

and citing many cases, announced the rule:

> "A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient." (l. c. 214)

The further language of the court pertinent to this question is as follows:

> "'It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party.' *Cable* v. *United States L. Ins. Co., supra* (191 U. S., p. 303, 48 L. ed. 192, 24 S. Ct. 74). Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. 'The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.' *Bank of Kentucky* v. *Stone*, (C. C.) 88 F. 383, 391; cf. *Lincoln Nat. L. Ins. Co.* v. *Hammer*, (C. C. A. 8th) 41 F. (2d) 12, 16. To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression." (l. c. 215)

The court accordingly reversed the opinion of the Circuit Court of Appeals for the Tenth Circuit, which by its opinion had held that the insurance company was not entitled to have the equity case heard and had held that the insurance company must make its defense to the action at law which was pending in the same federal court. This case of *American Life Insurance Co.* v. *Stewart, supra*, is the last opinion of the Supreme Court of the United States on this subject, and we think announces the rule with respect to the right to bring, maintain and prosecute an action for cancellation, even where a suit at law is pending in the *same* court.

After the above decision the Tenth Circuit Court of Appeals rendered its opinion affirming the decision of the District Court for the District of Kansas, which had heard the equity cases, and had entered a decree of cancellation.

—*Stewart* v. *American Life Ins. Co.*, 89 F. (2d) 743.

In the case of *Ruhlin* v. *New York Life Insurance Co.*, *supra*, the Court of Appeals of the Third Circuit reviewing the case of *American Life Insurance Co.* v. *Stewart*, *supra*, and other insurance cases in the United States Supreme Court and in the Circuit Courts of Appeals, said that the case of *American Life Insurance Co.* v. *Stewart* "disposes of practically every argument made in the case at bar, relating to the adequacy of the remedy at law, adversely to the contention of the appellants."

That court there held that the insurance company was entitled to maintain its equitable action for cancellation of the policy, notwithstanding the fact that the insured had previously commenced action at law in a state court to collect the benefits of the policy the cancellation of which was sought in the equity suit.

While a writ of *certiorari* was applied for and granted (302 U. S. 681) in the case of *Ruhlin* v. *New York Life Insurance Company*, *supra*, this particular principle of law was not discussed, but the cause was reversed in order that the decision might be brought within the doctrine of the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

—*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202.

Point III.

This Question Should Be Answered in the Affirmative.

The principle of law that the adequate remedy which will preclude a suit in equity must be one *available* in the federal courts, many times has been held applicable in cases involving insurance policies. This question assumes the existence of the principle, and the question is whether it is applicable in the instant case.

The question refers to the relief sought as being "affirmative in form but defensive in character." All suits brought for cancellation of insurance policies, contracts,

agreements or writings are affirmative in form in the equity suit and may be defensive in form when used as a defense to a law action. It does not occur to us that the instant case differs in that respect from any suit seeking the cancellation and delivering up of a contract in writing. It is with respect to the suit which seeks affirmative relief that the question relates.

The cases which we have cited and numerous other cases in this court and in the Circuit Courts of Appeals of the United States, announcing the principle stated in the question, have not turned upon the question of the relief sought being "affirmative in form but defensive in character," but have turned upon the question of whether the relief which a complainant seeks by a bill in equity will be denied, because it may be obtained in an action at law. If a complainant may obtain by an action at law *the same relief* to which he is entitled according to the allegations of his bill in equity, he is relegated to the action at law and cannot maintain his suit in equity.

In passing upon the point of law involved in this question, and also in the first and second questions, the facts in the case, as set out in the certificate, must not be lost sight of. The bill in equity was filed only five days before the expiration of the two-year period within which the Insurance Company had to initiate its contest. In the case of *American Insurance Co.* v. *Stewart, supra,* the suits in equity were filed "one year, five months and twenty days" prior to the expiration of the period within which they were contestable, and this fact was emphasized by the Circuit Court of Appeals of the Tenth Circuit in the two opinions preceding the decision in this Court. See:

Stewart v. *American Life Insurance Co.*, 80 Fed. 600, 601;

Stewart v. *American Life Insurance Co.*, 85 F. (2d) 791, 792.

We call attention to the statutes of Oklahoma set forth in the appendix, particularly to section 168, which provides that the summons shall be returnable within ten days from its date, and section 217, which provides that the answer or demurrer shall be filed within twenty days after the date on which the summons is returnable. Under these statutes at least twenty-one days was the earliest time in which an answer or demurrer could have been *required*. It is true that the Insurance Company might have filed its answer within the five-day period yet remaining to it, but in doing so it would have been obliged to waive its right to contest the sufficiency both of the service and the petition. Section 231 permits the filing of motions in advance of the demurrer or answer.

Under the Oklahoma statute (section 101, appendix), the Insurance Company had five years in which to bring an action.

We do not overlook the fact, as stated in the certificate, that the Insurance Company not only could set up the fraud as a defense to the action at law on the policy, but that it likewise could interpose a cross complaint in that action for a cancellation of the policies.

The question certified, and here being discussed, turns primarily, however, on the right of a plaintiff to maintain a suit in equity in the federal court where it cannot obtain the relief to which it is entitled, by a suit at law in the federal court. It is our belief that the section of the federal statutes which prohibits the maintenance of a suit in equity where an adequate remedy at law is available, was intended to apply and should apply only to the bringing and maintaining of suits, and that properly construed, it should not be held to mean that he may not maintain an action in equity if he has an opportunity *to interpose a defense* at law. This we believe to be the holding in the case of *Ameri-*

can Insurance Co. v. *Stewart, supra,* in cases of this character.

As we view this case it holds definitely and positively that the remedy at law—even in the Federal Court—has not the adequacy nor efficiency which will preclude the resort to equity.

We are not unmindful of the cases of,

Phoenix Mutual Life Insurance Co. v. *Bailey,* 80 U. S. 616; and

Cable v. *United States Insurance Co.,* 191 U. S. 287.

In the first case the action at law was pending in the same federal court in which the equity suit was brought, and the court there held that the equity suit could not be maintained because the same relief might be obtained by filing an answer in the law case. The same doctrine was adhered to in the *Cable* case, *supra,* except that the action at law was not pending in the federal court, but there was a right of removal which the insurance company could have exercised but did not exercise, and the court applied the doctrine of the case of *Insurance Co.* v. *Bailey, supra.*

The cases of *Phoenix Life Insurance Co.* v. *Bailey, supra,* and *Cable* v. *United States Life Insurance Co., supra,* were decided prior to the time when it was the practice of the insurance companies to place in their policies of insurance limitations on the period of contestability. This fact is emphasized and commented upon in the case of *Harnischfager Sales Corporation* v. *National Life Insurance Co.,* (C. C. A. 7th Cir.) 72 F. (2d) 921. There the court sustained the right of the insurance company to maintain its action in the federal court for cancellation of the policy, although an action at law was pending in the state court to which the insurance company could have filed an answer within the period of contestability. In that case the suit in equity was

filed in the federal court prior to the filing of a suit on the policies in the state court, but the period of contestability did not expire until approximately a year and a half after the filing of both actions. In this connection we desire to say that we do not understand that the time of filing the law action, whether before or after the filing of an equity suit in the federal court, can affect either the equitable jurisdiction of the federal court or the duty of the court to proceed, hear and pass upon the equitable action.

Referring to the case of *Harnischfager Sales Corporation* v. *National Life Insurance Co., supra*, we believe that the reasoning applied in that case is sound, and should be persuasive with respect to the questions here being discussed. There the court stated:

> "It is, of course, elemental that courts of equity have never taken jurisdiction over suits where an adequate remedy could be had at law. Section 723 of the Revised Statutes (28 U. S. C. A., Sec. 384) which provides that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law, has been said to be merely declaratory of the existing law rather than establishing a new rule. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 7 L. ed. 655. It was early settled that equity was not to use its power to order the cancellation of an insurance policy secured by fraud when the facts indicating that fraud could be used as a defense to a suit on the policy. *Phoenix Mutual Life Insurance Company* v. *Bailey*, 13 Wall. 616, 623, 20 L. ed. 601. The court there stated, 'Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is "a purely legal demand", and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a federal court, as it is clear that the case, under such

circumstances, is controlled by the sixteenth section of the Judiciary Act (28 U. S. C. A., Sec. 384).' This case was followed by the court in *Cable* v. *United States Life Insurance Company*, 191 U. S. 288, 24 S. Ct. 74, 48 L. ed. 188.

"Both of these cases were decided before it became the custom to incorporate in policies of life insurance a clause limiting the period during which such policies could be contested except for non-payment of premiums. Since the advent of these incontestability clauses the rule seems to have been established that the mere fact that such limitation is included in a policy, rendering it impossible for the insurer to set up the facts concerning the fraud in any way after the contestable period has expired, constitutes the element of possible irreparable injury necessary to confer jurisdiction upon courts of equity to hear suits to cancel policies for fraud, and to enjoin actions brought in courts of law subsequent to the filing of the bill in equity for the purpose of recovering benefits under the policies. This results from the definition of the word 'contest' adopted by a majority of the courts both federal and state, as a litigation, and requiring judicial action either by means of a suit in equity to cancel, or defense to a suit at law on the policy."

We believe, therefore, that the rule first announced in *Phoenix Mutual Life Insurance Co.* v. *Bailey*, *supra*, and followed in *Cable* v. *United States Insurance Co.*, *supra*, is inapplicable to situations where policies contain clauses such as were contained in these which specifically limit the time within which the insurance company may initiate a contest. We believe as well, that the case of *American Insurance Co.* v. *Stewart*, *supra*, in this court, supports our position. While the opinion does not directly or by express language note the distinction as does the case of *Harnischfager Sales Corporation* v. *National Life Insurance Co.*, *supra*, yet it emphasizes the "extraordinary privileges" which are given to the policy holder by these provisions.

Conclusion.

The three questions certified might well have been briefed under one point, since the authorities cited under the one are applicable to the others.

The case brought by the Insurance Company in the United States Court for the Northern District of Oklahoma was within the general jurisdiction of that court by reason of diversity of citizenship and the amount involved, and was clearly within its equity jurisdiction as well. Under the provision in the policies, at the time the suit was brought, because of the provision in the policies, it had but five days in which it must initiate a contest. The insured died just eighteen days before the period of contestability expired. This right of the Insurance Company to invoke the equitable jurisdiction of the United States Court means nothing to it if the adversary, at his own will, may determine by his action whether the United States Court will proceed to hear the complaint of the plaintiff. If the Federal Court cannot proceed to judgment and afford to the complainant its measure of redress, its right to proceed in the Federal Court means nothing.

In the very recent case of *Southern Pacific Co.* v. *Corbett*, (9th Cir.) 20 Fed. Supp. 940 (a "three-judge" opinion), the court say:

> "When a bill in equity is brought in the Federal Court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the Federal Court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the Federal Courts. * * * When one has a cause of action at law, and there exist requisites of Federal jurisdiction, his remedy at law is the right to sue in the state or Federal tribunal at his elec-

tion. To deprive him of this choice materially impairs the completeness and adequacy of his remedy."

See, also:

Arrowsmith v. *Gleason*, *supra*;
Payne v. *Hook*, 74 U. S. (7 Wall.) 425.

Having the undoubted right under the statute to invoke the jurisdiction of the Federal Court in the only manner by which the Insurance Company could invoke it, that court, as stated in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, "was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction."

We respectfully submit that the questions should be answered in the manner herein indicated.

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APPENDIX.

164. A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereof.

165. A copy of the petition need not accompany the summons, but the defendant or plaintiff shall be entitled to a copy of the petition, or any other paper filed in the action, upon application to the clerk therefor; and the cost of such copy shall be taxed among the costs in the action.

166. The summons shall be issued by the clerk, upon a written praecipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be endorsed on the writ the amount, to be furnished in the praecipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs.

168. The summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than the one in which the action is commenced, within ten days from its date; and when issued to another county, shall be made returnable in not less than ten nor more than sixty days from the day thereof, at the option of the party having it issued.

217. The answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable; the reply or demurrer shall be filed within thirty days after the day on which the summons was made returnable; the demurrer to the reply shall be filed within forty days after the day on which the summons was made returnable.

231. If redundant, or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

101. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. Within five years: An action upon any contract, agreement or promise in writing.

FILE COPY

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No. 598

In the Supreme Court of the United States

October Term, 1938.

ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INC.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

Brief and Argument for W. I. Southern, Inc.

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Tulsa, Oklahoma,
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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1938.

No. 598

ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INC.

BRIEF AND ARGUMENT FOR W. I. SOUTHERN, INC.

Statement and Summary,

The statement and summary in the brief of Atlas Life Insurance Company, a corporation, is a correct statement of the record.

It is to be noted that the action at law was filed by W. I. Southern, Inc., in the District Court of Tulsa County, Oklahoma, before the expiration of the period in which the policies might be contested, upon the ground of fraud in their procurement, and that service of summons therein was obtained upon Atlas Life Insurance Company prior to the filing of the bill in equity seeking cancellation of the policies in the United States District Court for the Northern District of Oklahoma, the law actions being filed in the state court and service obtained upon the 7th day of March, 1938, and the bill in equity being filed in the United States District Court for the Northern District of Oklahoma on the 8th day of March, 1938 (Cert., pp. 1, 2).

This brief and argument is filed on behalf of W. I. Southern, Inc.

Statutes Involved.

The only statute necessary for the decision of the certified questions, save and except section 267 of the Judicial Code, U. S. C. A. title 28, section 384, which provides:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law,"

is a statute of the State of Oklahoma, which we believe pertinent to the decision of the certified questions. Such statute is: Section 206 of Oklahoma Statutes 1931, relating to the pleading of equitable defenses in an answer filed in an action at law.

This section of the Oklahoma statutes is set out in the appendix hereto.

ARGUMENT *and* AUTHORITIES.

The first question certified should be answered in the affirmative.

The second question certified should be answered in the negative.

The third question certified should be answered in the negative.

POINT I.

The availability and effect of fraudulent representations made in procuring a policy of life insurance, as a defense are, in this case, to be determined by the law of the State of Oklahoma.

So long as the doctrine announced by *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. ed. 865, 871, was the law, the effect of the

alleged fraudulent representations in the procuring of the life insurance policies here involved, would not necessarily have been determined by the laws of the State of Oklahoma.

The recent decisions of this court in *Erie R. R. Co., Petitioner*, v. *Harry J. Tompkins*, 304 U. S. 64, and in *Ruhlin* v. *Life Ins. Co.*, 304 U. S. 202, have resulted in the overturning of the rule originally announced by *Swift* v. *Tyson, supra*, and have established the law to be as stated in Point I above.

This honorable court in the case of *Erie R. R. Co.* v. *Tompkins, supra*, has recognized that the rule theretofore existing resulted in allowing non-citizens to unfavorably discriminate against resident citizens in the selection of the forum in which an action was to be tried.

Upon this subject the following pertinent language appears in the opinion:

> "Experience in applying the doctrine of *Swift* v. *Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.
>
> "On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enjoyment was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the

United States, the doctrine had prevented uniformity in the administration of the law of the state.

* * * * * * *

"* * * If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." (l. c. 74.)

It is therefore now settled that the effect of the alleged fraudulent representations sought to be used by Atlas Life Insurance Company as a basis for its bill in equity seeking cancellation of the policies here involved is to be determined solely by the law of the State of Oklahoma.

It is also finally determined by the above decisions that the availability of such alleged fraudulent representations as a defense to an action at law upon the policies is to be determined solely by the law of the State of Oklahoma.

Point II.

Under the law of the State of Oklahoma the Atlas Life Insurance Company had the right to plead the alleged fraud as a complete defense to the action at law pending on the policies in the state court.

Section 206 of the Statutes of Oklahoma, set forth in the appendix, provides in substance, that a defendant in his answer may set forth both legal and equitable grounds of defense. The Supreme Court of the State of Oklahoma has announced the law to be that a legal cause of action may be defeated by the pleading and proving of an equitable defense.

One of the parent cases of the state is *Farmers & Merchants National Bank* v. *Hoyt*, 29 Okl. 772:

"In this state, whilst the distinction between law and equity is abolished, equitable relief may be awarded by the District Courts under a proper state of facts. *Atwood* v. *Mikeska, et ux.*, 115 Pac. 1011. In 2 Pomeroy's Equity Jurisprudence, (3d ed.) Sec. 868, p. 1538, it is said: 'The jurisdiction may be exercised either defensively or affirmatively. * * * In states which have adopted the reformed procedure, the equitable jurisdiction may also be invoked, if necessary, by defendants in legal actions. This may be done by means of equitable defenses which simply defeat the plaintiff's legal cause of action, or by means of equitable counterclaims or cross-complaints, which demand for the defendant some affirmative relief, as reformation or cancellation'." (l. c. 775-776.)

Each of the policies involved in this action contains the following provision:

"All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it be contained in the written application and a copy of the application is endorsed upon or attached to this policy when issued." (Cert. 2.)

Under the law of the State of Oklahoma, as laid down by the Supreme Court of the state, in actions upon insurance policies, containing provisions similar to the one above quoted, in order for untrue representations in the application to be available as a defense, such representations must have been wilfully false, fraudulent or misleading. If the representations were wilfully false, fraudulent or misleading; then such fact is available as a defense to an action brought upon the life insurance policies by the beneficiary, and will avoid the policies. Such decisions are uniform and unvarying upon this subject.

We call attention to the following decisions from tha court:

New York Life Ins. Co. v. *Stagg*, 95 Okl. 252;
New York Life Ins. Co. v. *Smith*, 133 Okl. 256;
New York Life Ins. Co. v. *Clark*, 110 Okl. 31;
New York Life Ins. Co. v. *Carroll*, 154 Okl. 244;
Reserve Loan Life Ins. Co. v. *Isom*, 70 Okl. 277.

Therefore, it is definitely determined that under the law of Oklahoma the defense that a life insurance policy was procured by fraud is available as a defense in an action at law, brought upon the policy by the beneficiary. When the policy, as in the instant case, contains a provision that all statements made by the insured shall be deemed representations and not warranties, then the burden is upon the defending insurance company to establish that such statements were wilfully false, fraudulent or misleading. If the insurance company succeeds in establishing such defense the policy will be avoided in the action at law.

It would seem certain therefore that if jurisdiction of the bill in equity filed by the Atlas Life Insurance Company seeking cancellation of the policies involved is retained in the United States District Court for the Northern District of Oklahoma, such court must necessarily follow the law as established by the Supreme Court of Oklahoma in determining the question as to the effect to be given to the alleged fraudulent representations set out in such bill. The result of the United States District Court retaining jurisdiction, in the equity action, is to deprive W. I. Southern, Inc., plaintiff in the law action pending in the state court, of its right to trial by jury in that pending state court action, merely to afford the Atlas Life Insurance Company the opportunity to have the identical law that would govern the case in the state court applied in the United States District Court for the Northern District of Oklahoma.

Point III.

Section 267 of the Judicial Code does not purport to command that the United States District Courts shall grant equitable relief in every case where such courts are unable to grant relief upon the law side, and especially is such fact true when the want of legal remedy is due to the express prohibition of Congress. Therefore, the fact that Atlas Life Insurance Company is unable to remove the state court action pending against it upon the policies in the state, because it is a resident and citizen of the State of Oklahoma, does not warrant the United States District Court for the Northern District of Oklahoma in assuming jurisdiction of the bill in equity to cancel such policies filed by the insurance company when such company has a plain, adequate and complete remedy at law by pleading and proving the fraud as a defense in the pending state court action.

W. I. Southern, Inc., commenced an action at law against the Atlas Life Insurance Company upon the policies involved here by filing its petition in the District Court of Tulsa County, Oklahoma, and serving summons upon said insurance company prior to the filing of the bill of equity in the United States District Court for the Northern District of Oklahoma by the insurance company. (Cert. 2.)

The Atlas Life Insurance Company was a citizen and resident of the State of Oklahoma, and therefore could not remove the law actions in the state court to the United States District Court. (Cert. 2.)

In this case the Insurance Company contends that because the law action could not be removed from the state court to the United States District Court there was no legal remedy available in the federal court upon the law side, and that therefore it had the right to maintain an action in equity in the federal court. It contends that the rule is that

in order for a legal remedy to be such an adequate reme
at law as to prevent the maintaining of an equity actio
must be available upon the law side in the federal court.
is the contention of W. I. Southern, Inc., that the fact t
the Insurance Company is prevented from removing t
case to the law side in the federal court by reason of lack
diversity of citizenship, does not prevent the remedy at l
in the pending state court action from being such an a
quate remedy at law as will prevent the maintenance of
equity action in the United States District Court.

W. I. Southern, Inc., possessed the right of selecting
forum in which to file its actions upon the policies. To p
mit the insurance company to maintain the action in equ
will deprive W. I. Southern, Inc., of the right of jury tr
which it possesses in the pending state court actions. The
surance company will be afforded exactly the same relief
defending in the state court action as it would be afford
in the equity action in the federal court. The federal co
in the trial of the equity action will be governed by the l
of Oklahoma as to the effect to be given the alleged frau
lent representations. The United States District Court
such action will apply exactly the same rules of general a
statutory law as would be applied by the District Court
Tulsa County in the law action. The effect of allowing
United States District Court to retain jurisdiction in
equity action for cancellation would be to grant to a resid
of Oklahoma, the insurance company, the privilege of sel
ing the forum of the federal court and thereby ousting
state court of its prior acquired jurisdiction, and so thus
prive W. I. Southern, Inc., of its right to a jury trial u
the issues. This we believe may not be done.

It is our belief that this matter is settled in favor of
position of W. I. Southern, Inc., by the decision of this co

rendered in the case of *Di Giovanni* v. *Camden Fire Ins. Co.*, 296 U. S. 64.

We are unable to distinguish on principle the rule laid down in that case from the rule for which we contend in this case.

In the above case the insurance company brought an action in the United States District Court for the Western District of Missouri, to cancel two fire insurance policies, one for $3,0000.00 issued to Pete Di Giovanni, and his wife, Mary Di Giovanni, upon a building, and the other for $1,500.00 issued to Pete Di Giovanni alone, upon personal property located in the building. The insurance company was a resident and citizen of New Jersey and the Di Giovannis were citizens of Missouri. The insurance company alleged that the two policies were procured by a conspiracy on the part of the Di Giovannis and the requisite jurisdictional amount was reached by combining in the bill an action to cancel both said polices which were alleged to have been obtained through the conspiracy. This court assumed, for the purpose of the opinion, that the jurisdictional amount was present by virtue of the conspiracy allegation, and thereafter passed to a consideration of the question of whether there was an adequate remedy at law by defending in law actions that might be filed upon said policy. It is true that these policies were fire insurance policies containing no incontestable clause. However, in the instant case, actions at law were filed in the state court affording Atlas Life Insurance Company the opportunity to present its contest by pleading fraud prior to the expiration of the contestable period of said policies. This court held that the mere fact that the insurance company was prevented from having the law actions upon such policies tried upon the law side in the federal court would not affect the jurisdiction to the federal court upon the equity side upon the theory that there was

no plain, adequate remedy at law. The language of the opinion admits of no dispute and is as follows:

> "Section 24 of the Judicial Code, U. S. C. A., Title 28, Sec. 41, restricts the jurisdiction of the District Courts whether at law or in equity to controversies in which the amount involved exceeds $3,000. Section 267 of the Judicial Code, U. S. C. A., Title 28, Sec. 384, forbids the maintenance of suits in equity in the courts of the United States 'in any case where a plain, adequate and complete remedy may be had at law.' It is true, as this court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. See *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 74 L. ed. 737, 50 S. Ct. 270; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418; *Risty* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 378, 70 L. ed. 641, 46 S. Ct. 236. This follows from the nature of 'equity jurisdiction' of the federal courts. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give. See *Pennsylvania* v. *Williams*, 294 U. S. 176, 181, 79 L. ed. 841, 846, 55 S. Ct. 380, 96 A. L. R. 1166. If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford. Otherwise the suitor in the federal courts might be entitled to a remedy in equity which the federal courts of law are competent to give, or on the other hand, be obliged to forego his right to be heard in the federal courts in order to secure an equitable remedy which state courts of law do but the federal courts of law do not give. See *Stratton* v. *St. Louis S. W. R. Co.*, 284 U. S. 530, 533, 76 L. ed. 465, 469, 52 S. Ct. 222; *Matthews* v. *Rodgers*, 284

U. S. 521, 529, 76 L. ed. 447, 52 S. Ct. 217. But want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers. The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity. See *Healy* v. *Ratta*, 292 U. S. 263, 78 L. ed. 1248, 54 S. Ct. 700.

"As the nature of the relief sought, cancellation of the insurance policies, and the inability of the federal courts to hear the suits at law for want of the jurisdictional amount; do not warrant equitable relief, it is evident that the remedy which respondent seeks depends on the slender threat of its right to ask the federal court of equity to save it the possible inconvenience of trying two lawsuits instead of one." (l. c. 69-70)

We are at a loss to understand in view of this decision how it can be said that the United States District Court must assume jurisdiction in equity in this case because the Atlas Life Insurance Company could not remove the pending state court actions at law for lack of diversity of citizenship. It would seem immaterial upon the question under discussion whether the inability to reach the law side in the federal court resulted from lack of diversity of citizenship, or lack of jurisdictional amount. It seems to us that the same reasoning is followed and the same result reached by this court in its decision in *Matthews* v. *Rodgers*, 284 U. S. 521.

This was an attempt to enjoin in the federal court the collection of a state tax as being in violation of the Constitution of the United States. The state law provided that the tax might be paid under protest, and that an action at law might be brought to recover same.

This court denied equity jurisdiction and by its decision announced that the state procedure afforded a plain, adequate and complete remedy at law, and in so holding used the following language:

> "If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this court for review, if any federal question be involved, Judicial Code, Sec. 237, U. S. C. A., title 28, Sec. 344, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present." (l. c. 526.)

The same holding is manifested by the case of *Stratton* v. *St. Louis, S. W. R. Co.*, 284 U. S. 530.

A recent decision by the United States Circuit Court of Appeals for the 10th Circuit sustains our position as follows:

> *New York Life Ins. Co.* v. *Thompson*, 78 F. (2d) 946.

The facts are: *First*, the insured brought action for $500.00 in the state court for disability benefits.

Second, defense of failure to pay premiums brought about by fraud of insured was available as defense in the pending state court in action at law.

Third, in federal court action on equity side insurance company by cross petition sought cancellation of disability clause of policy because of alleged fraud in application, return of benefits paid and decree cancelling policy, and the enjoining of the state court action. The Circuit Court of Appeals of the Tenth Circuit denied equitable jurisdiction in the following language:

> "In a straight life policy, an action at law therein cannot be maintained until the death of the insured. If

therefore happens that, as long as the insured is alive, there is no action at law in which the company may assert its defense during the contestable period; it follows that during his lifetime equity may act. But the policy here contains a disability clause on which a cause of action may accrue in the lifetime of the insured. An action at law on that clause is pending. In that action appellant may interpose as a defense the fraud alleged here as a basis for equitable relief. Being completely available there, it is nof available here." (l.c. 947-948.)

Another case directly in point upon the subject is *New York Life Ins. Co.* v. *Marshall*, 21 F. (2d) 172 (D. C. E. D. La.).

FACTS.

First, the defendant was beneficiary in two policies of life insurance for $2500.00 each. *Second*, she brought action to recover upon one of these policies in a District Court of Louisiana. *Third*, thereafter the insurance company filed this suit in equity seeking cancellation of both policies, and seeking an injunction against the prosecution of the state court action. *Fourth*, the beneficiary moved to dismiss the bill and one of the grounds of said motion was that there was a plain, adequate and complete remedy at law available to the insurance company in the state court action. The court held:

First, that jurisdiction as to amount could be conferred by seeking in the bill to cancel both said policies.

Second, that there was a plain, adequate remedy at law by defending upon the ground of fraud in the state court action. The language of the United States District Court upon this subject being as follows:

"But, where a court of the state has first assumed

jurisdiction of a cause which is lawfully within its jurisdiction, and that cause is not removable to a federal court, equitable jurisdiction does not accrue to such federal court because it is thought that the law as administered by that court is more favorable to the party seeking its aid. *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 309, 24 S. Ct. 74, 48 L. ed. 188.

"In *Phoenix Mut. Life Ins. Co.* v. *Bailey*, 13 Wall. 621, 20 L. ed. 501, the Supreme Court distinctly decided that, although equity courts have power to order the delivery of and cancellation of a policy of insurance obtained on fraudulent representations and suppression of facts, yet it will not generally do so when the representations and suppression can be perfectly well used in a defense at law in a suit upon the policy. Hence a bill for such purpose may be properly dismissed without prejudice." (l. c. 174.)

The judgment of the trial court in this cause was affirmed by the United States Circuit Court of Appeals of the Fifth Circuit in *New York Life Ins. Co.* v. *Marshall*, 23 F. (2d) 225.

In the brief of Atlas Life Insurance Company great reliance is placed upon the decision of this court in the case of *American Life Insurance Company* v. *Stewart*, 300 U. S. 203. We believe that the effect of this decision upon the facts involved therein has been misconceived in the brief of the insurance company.

The facts of the case were that the action in equity to cancel the insurance policies was filed by the insurance company prior to the institution of action at law upon the policies by the beneficiary. Both actions were instituted in the United States District Court. The basis of the decision is that at the time the equity action was filed, no law action then being pending, there existed no full, adequate and complete remedy at law because the beneficiary in the policy

might by awaiting the expiration of the incontestable period before filing the law action deprive the insurance company of its defense upon the ground of fraud. Had a law action been pending upon these policies prior to the filing of the equity action there would have been full, adequate and complete remedy at law available to the insurance company.

Following the case of *American Life Ins. Co.* v. *Stewart*, *supra*, the fact that the basis of sustaining the equity jurisdiction was because there was no law action pending at the time of the filing of the bill is directly recognized in a later case by the United States Circuit Court of Appeals of the Tenth Circuit in its decision in *Metropolitan Life Ins. Co.* v. *Banian*, 86 F. (2d) 886.

We have been unable to find any authority from this court to the effect that equity will retain jurisdiction for the cancellation of life insurance policies upon the ground of fraud in the procurement of said policies when prior to the expiration of the contestable period, and prior to the institution of the equity action for cancellation, a law action has been instituted, either in the state or federal court, by the beneficiary seeking recovery upon the policies and thereby affording the insurance company the opportunity to defend upon the ground of such fraud. No such authority is cited in the brief of the Atlas Life Insurance Company in this court.

We respectfully assert that the correct rule is and should be that when a law action is instituted in a court of competent jurisdiction, either state or federal by the beneficiary upon a life insurance policy, at a time before the expiration of the contestable period, so that the insurance company is afforded the opportunity of defeating the policy by defending in that action, equity does not have jurisdiction.

It is therefore respectfully submitted that the questions should be answered in the manner hereinbefore indicated.

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APPENDIX.

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The answer shall contain:

First. A general or specific denial of each material allegation of the petition controverted by the defendant.

Second. A statement of any new matter constituting a defense, counterclaim, or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition.

Third. When relief is sought, the nature of the relief to which the defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counterclaim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. Each must be separately stated and numbered, and they must refer, in an intelligible manner, to the causes of action which they are intended to answer.

SUPREME COURT OF THE UNITED STATES.

No. 598.—October Term, 1938.

Atlas Life Insurance Company, *vs.* W. I. Southern, Incorporated. } On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

[April 17, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

In this case the Court of Appeals for the Tenth Circuit has certified to us questions of law concerning which it asks instructions for the proper decision of the cause pending in that court. Judicial Code, § 239, 28 U. S. C. § 346.

The certificate states that on March 13, 1936, Atlas Life Insurance Company, an Oklahoma corporation, plaintiff below, issued, on a single application, three policies of insurance on the life of one Southern, in amounts of $10,000, $15,000 and $25,000 respectively, each naming as beneficiary W. I. Southern, Inc., a Delaware corporation. All of the policies contained an incontestable clause reading:

"This policy will be incontestable after two years from date of issue except for the nonpayment of premium and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any."

and a clause relating to statements of the insured in his application as follows:

"All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it be contained in the written application and a copy of the application is endorsed upon or attached to this policy when issued."

The insured died February 23, 1938, and on March 7, 1938, the corporate beneficiary began suit against the insurance company in the Oklahoma state district court. On the following day the insurance company brought a suit in equity against the beneficiary in the federal district court for northern Oklahoma for cancellation of

the policies, on the ground that in his application the insured had intentionally and fraudulently given false answers to questions material to the risk. The trial court sustained a motion to dismiss the equity suit, made on the ground that the insurance company had an adequate remedy at law by setting up the alleged fraud as a defense to the action pending in the state court. The insurance company electing not to plead further, a decree was entered dismissing the bill, from which the insurance company appealed to the Circuit Court of Appeals.

Under the Oklahoma practice the insurance company can set up the fraud as a defense to the action at law on the policies, or can interpose a cross-complaint in that action for cancellation of the policies. *Farmers & Merchants Bank* v. *Hoyt*, 29 Okla. 772. The action on the policies in the state court is not removable by the insurance company, since it is not a non-resident of Oklahoma within the meaning of § 28 of the Judicial Code, 28 U. S. C. § 71.

The questions certified are as follows:

"1. Is the remedy at law available in the state court by setting up the alleged fraud as a defense to the action on the policies, such an adequate remedy at law as will constitute a valid defense to the suit in equity for cancellation of the policies?

"2. In order to constitute a defense to a suit in equity to cancel a policy of life insurance on the ground of fraud, is it essential that the remedy at law be available to the complainant in an action at law pending in the federal court?

"3. Is the principle that the adequate remedy at law which will preclude a federal court of equity from granting relief must be one available in the federal courts, applicable in the instant case where the relief sought is affirmative in form but defensive in character?"

Section 11 of the Judiciary Act of 1789, 1 Stat. 78, provided that the circuit courts should have "cognizance . . . of all suits of a civil nature at common law or in equity," in cases appropriately brought in those courts. This provision is perpetuated in § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1), which declares that the district courts shall have jurisdiction of such suits. The "jurisdiction" thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. *Payne* v. *Hook*, 7 Wall. 425, 430; *In re Sawyer*, 124 U. S. 200, 209-210; *Matthews* v.

Rodgers, 284 U. S. 521, 525; *Gordon* v. *Washington*, 295 U. S. 30, 36. This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity. See *Massachusetts State Grange* v. *Benton*, 272 U. S. 525, 528; *Pennsylvania* v. *Williams*, 294 U. S. 176, 181, and cases cited.[1]

Section 16 of the Judiciary Act of 1789, 1 Stat. 82, continued without material change as § 267 of the Judicial Code, 28 U. S. C. § 384, declares that suits in equity shall not be sustained in the courts of the United States in any case where a "plain, adequate and complete remedy may be had at law." The command of § 267 is but a declaration of the equity rule established long before the enactment of the Judiciary Act, and it serves by emphasis of the rule to protect the states from the encroachments which would result from the exercise of equity powers by federal courts failing to observe it. *Matthews* v. *Rodgers*, *supra*, 525; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530.

By long-settled construction, the accepted test of legal adequacy which the section prescribes is the legal remedy which the federal, rather than state, courts afford.[2] *Smyth* v. *Ames*, 169 U. S. 466; *Risty* v. *Chicago Ry. Co.*, 270 U. S. 378, 388; *Di Giovanni* v. *Cam-*

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[1] Unlike the objection that the court is without jurisdiction as a federal court, see Mansfield Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U. S. 379, 382, the parties may waive their objections to the equity jurisdiction by consent, Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 380; Re Metropolitan Railway Receivership, 208 U. S. 90; cf. Marin v. Augedahl, 247 U. S. 142, or by failure to take it seasonably. Brown v. Lake Superior Iron Co., 134 U. S. 530, 535-536; Southern Pacific R. Co. v. United States (No. 1), 200 U. S. 341, 349. The objection should be taken by the court *sua sponte*, when obvious, Lewis v. Cocks, 23 Wall. 466, 470; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 484, or when the exercise of the equity powers of the federal court affects the relationship of the federal to the state courts. See Kennedy v. Tyler, 269 U. S. 13; Matthews v. Rodgers, 284 U. S. 521, 525-526; Pennsylvania v. Williams, 294 U. S. 176, 185; Di Giovanni v. Camden Insurance Ass'n, 296 U. S. 64, 73. Cf. Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, 290 U. S. 264, 271-273.

[2] "Otherwise the suitor in the federal courts might be entitled to a remedy in equity which the federal courts of law are competent to give, or, on the other hand, be obliged to forego his right to be heard in the federal courts in order to secure an equitable remedy which state courts of law do but the federal courts of law do not give. See Stratton v. St. Louis Southwestern Ry., 284 U. S. 530, 533, 534; . . ." Di Giovanni v. Camden Insurance Ass'n, 296 U. S. 64, 69.

den Insurance Ass'n, 296 U. S. 64; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 217. But although the adequacy of the legal remedy precludes resort to a federal court of equity, it does not follow that the converse is true—that the want of a legal remedy in the federal courts gives the suitor free entrance to a federal court of equity. Absence of legal remedy does not dispense with the necessity of alleging and proving a cause of action in equity as a prerequisite to equitable relief in a federal court. *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379; *Di Giovanni* v. *Camden Insurance Ass'n, supra; American Life Insurance Co.* v. *Stewart*, 300 U. S. 203.

The insurance company in the circumstances disclosed by the certificate is without remedy in a suit at law. The federal courts can render no judgment at law directing cancellation of a contract for fraud in its inception or preserving evidence of the fraud. These are forms of relief which a court of equity alone can give. But the basis of equitable relief is that the cancellation asked is necessary to protect the suitor from irreparable injury when there is manifest danger that his defense at law on the policy will be lost or prejudiced. *Enelow* v. *New York Life Insurance Co., supra; Di Giovanni* v. *Camden Insurance Ass'n, supra; American Life Insurance Co.* v. *Stewart, supra.*

Ordinarily when the defense of fraud may be interposed to an action at law on the policy and such an action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law. In such a case the bill is dismissed without prejudice, not because there is want of jurisdiction in the federal court, but because the plaintiff has made no case for equitable relief. *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Cable* v. *United States Life Insurance Co.*, 191 U. S. 288; *Enelow* v. *New York Life Insurance Co., supra; Di Giovanni* v. *Camden Insurance Ass'n, supra.* And since the issue is not one of jurisdiction but of the need an propriety of equitable relief, the mere fact that the suit at law which is imminent can be brought only in the state court, or that it is pending there, is immaterial. *Cable* v. *United States Life Insurance Co., supra; Di Giovanni* v. *Camden Insurance Ass'n, supra; cf. Insurance Co.* v. *Bailey, supra.* It is no ground for equitable relief that the suit at law is brought in a state rather than a federal court, for the insurance company's defense may be protected there as well as in a

federal court, and in that case there is no threat of irreparable injury. See *Cable* v. *United States Life Insurance Co., supra.* On comparable grounds a federal court may withhold its aid when a plaintiff has failed to resort to a state administrative remedy. *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300, 310-311. Only when special circumstances are shown which subject the insurer to the hazard that his defense to the suit at law, whether in the state or federal court, will be lost or prejudiced, is there occasion for equity to give relief. *American Life Insurance Co. v. Stewart, supra.*

In the light of what we have said it is evident that the certified questions cannot be properly answered, both because they are apparently framed without reference to the requirements for the maintenance of a suit in equity in the federal courts independently of § 267 of the Judicial Code and on the mistaken assumption that that section affords the only test of the insurance company's right to proceed in a federal court of equity; and because the certificate does not exclude the possibility that there are facts, lurking in the record or within the range of judicial notice, which may have a material bearing on the insurance company's need for equitable relief.

Since the insurance company has no remedy at law in the federal courts for the cancellation of the policies, § 267 interposes no obstacle to a suit in equity in a federal court. But it is requisite under § 24(1) of the Judicial Code to the maintenance of suit there that facts should be presented entitling the company to equitable relief. In this aspect of the case the certified questions are incapable of categorical answer and the questions which they suggest can be properly answered only by reframing the questions certified or giving qualified answers to them. This we are not required to do, see *Jewell* v. *Knight*, 123 U. S. 426, 432, 435; *Chicago, Burlington & Quincy Ry. Co.* v. *Williams*, 205 U. S. 444; *United States* v. *Barth*, 276 U. S. 606; *White* v. *Johnson*, 282 U. S. 367, and cannot properly do without recourse to the record, which is not before us.

The suit at law in the state court in this case was brought shortly before the expiration of the two year period after which the incontestable clause, according to its terms, would come into operation. The fact that that period was about to expire was thought to be a sufficient ground for resort to equity in *American Life Insurance Co.* v. *Stewart, supra*, where no suit at law was pending or appeared to be imminent when the bill was filed. But

we cannot say, at least without qualification, that a complainant similarly sustains the burden of showing threatened irreparable injury when a suit at law is pending in which he is free to set up as a defense the fraud on which he must rely in a cancellation suit in equity. Whether there are other special circumstances in the present case entitling the insurance company to equitable relief; whether there are peculiarities of local procedure which, in some circumstances, might impair the insurance company's defense; whether such circumstances exist; or whether, under local law, a defense once interposed before the policy has become incontestable is a "contest" sufficient to preserve the insurer's rights for all purposes, see *New York Life Insurance Co.* v. *Hurt*, 35 F. (2d) 92, 95; *Harnischfeger Sales Corporation* v. *National Life Insurance Corp.*, 72 F. (2d) 921, 922; *Killian* v. *Metropolitan Life Insurance Co.*, 251 N. Y. 44, 48, are questions which the certificate does not exclude from the case and which have not been briefed or argued here. Yet they are questions which may require consideration before a court can determine whether the equity suit should be dismissed or whether the bill should be retained without further proceedings pending disposition of the suit at law, as may be done by the equity court in its discretion. *Landis* v. *North American Co.*, 299 U. S. 248; *American Life Insurance Co.* v. *Stewart*, *supra*, 215. The guiding principle is that the federal court should proceed only so far as is necessary to protect the suitor from loss of his defense at law, without needlessly interfering with the determination of the plaintiff's rights in the state court, where his action was properly begun. See *Di Giovanni* v. *Camden Insurance Ass'n*, *supra*, 73, and cases cited.

The certificate fails to disclose whether all the facts and circumstances pertinent to this issue have been certified. This Court cannot be required by certificate to answer, and should not answer, questions which may be affected by unstated matter lurking in the record, or questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is inconsistent with the certificate. See *Tripplett* v. *Lowell*, 297 U. S. 638, 648, 649.

The certificate is

Dismissed.